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IN THE

Supreme Court of the United States

MIRIAM CURNIN and THOMAS F. CURNIN,

Petitioners,

—v.—

TOWN OF EGREMONT, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Town of Egremont and its officers violated the First Amendment by denying nonvoting taxpayers the opportunity to speak at open town meetings on the same basis as that enjoyed by registered voters.

2. Whether the unbridled discretion vested in the Egremont Town Moderator to determine whether and when nonvoting taxpayers may speak at open town meetings violates the First Amendment.

PARTIES TO THE PROCEEDING

Petitioners in this Court, plaintiffs-appellants below, are Miriam Curnin and Thomas F. Curnin.

Respondents in this Court, defendants-appellees below, are the Town of Egremont, Town Moderator Thomas Gage, and Egremont Selectboard Members Bruce Turner, Thomas Haas and Mary Brazie. Former Selectboard Member Philip Reilly was a defendant below, but Mr. Haas was substituted as a defendant after Mr. Reilly died during the pendency of this action.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit is reported at 510 F.3d 24 and is reprinted in the Appendix hereto at 1a-16a. The United States District Court for the District of Massachusetts did not issue a written opinion when it denied Petitioners' motion for a preliminary injunction, but instead stated that the transcript of the preliminary injunction hearing would act as its memorandum. J.A. 337.[1] The district court also did not issue a written order denying Petitioners' motion for a preliminary injunction, but instead noted such order on the docket sheet. App. 17a-18a.[2]

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2007. The court of appeals denied a timely petition for rehearing *en banc* on January 9, 2008. App. 19a-20a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] References to "J.A." are to the appendix of record materials filed with the court of appeals.

[2] References to "App." are to the appendix to this petition.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution is reproduced in the Appendix to this petition at 21a.

STATEMENT OF THE CASE

This case raises fundamental questions about taxpayers' rights to speak freely at local town meetings. Petitioners Miriam and Thomas F. Curnin wish to speak at their local town meetings on the same basis as other town residents but are denied such equal speech rights solely because they are not registered to vote in the town and despite the fact that they own property in the town, pay taxes to the town, and receive essential services from the town.

The Parties

Petitioners are longtime residents of the Town of Egremont, Massachusetts, having first purchased residential property there in 1991. J.A. 61. Although Petitioners are not permanent residents of the Town, they live there for a significant number of months each year. J.A. 62. Petitioners pay taxes to the Town, including approximately $150,000 paid in property taxes from 1991 through 2006. J.A. 61. Petitioners are registered to vote in New York. App. 6a.

There is a sizable population of individuals who share Petitioners' status as residents of the Town of Egremont who are registered to vote elsewhere. From 2001 through 2006, this group collectively paid approximately forty percent

(40%) of the Town's property tax revenue. J.A. 76-81.

Respondent Thomas Gage is and was during all relevant times the Town Moderator for the Town of Egremont and represents the Town in that capacity. J.A. 30, 61. As the Town Moderator, a paid elected official, J.A. 30, Gage's specific duties are authorized by Mass. Gen. Laws, Ch. 39, §§ 15, 17 to 18, and include calling town meetings to order, recognizing attendants who want to speak, and calling for votes on matters that are on the town meeting agenda. J.A. 30-32.

Respondents Bruce Turner, Thomas Haas and Mary Brazie are or were during all relevant times Selectmen of the Town of Egremont and represent the Town in that capacity. J.A. 61. As Selectmen in elected positions for which they are paid, J.A. 49, they make suggestions to voters through the issuance and distribution of a warrant. J.A. 90-91.

The Town of Egremont is also a respondent in this action.

The Egremont Town Meeting

The Egremont Town Meeting is the legislative body of the Town of Egremont. App. 5a. Town meetings are where the registered voters of Egremont vote on matters of importance to the community, including by-laws, taxes, zoning, the town budget, and other economic issues. J.A. 53-54, 90. In addition to the annual town meeting, special town meetings dedicated to specific issues are held on an as-needed basis. J.A. 223-24, 240-41.

The Egremont Town Meeting is an open town meeting (as compared to a representative town meeting) whereby all citizens registered to vote in the Town are eligible legislators. App. 5a. As there is no requirement that voters actually attend town meetings, the composition of any given town meeting cannot be determined until the meeting is called to order.

The Egremont Town Meeting is also open to the public; anyone can attend. App. 9a n.3. Registered voters have the right to address the meeting. J.A. 95. If nonvoting taxpayers such as Petitioners wish to speak, they must first obtain the permission of the Town Moderator. App. 5a-6a.

Egremont's policy regarding the speech rights of nonvoters at town meetings is informal and inconsistent. Not only is the policy unwritten (*i.e.*, not contained in any statute, Town by-law, or Town Charter), but it has been applied in an inconsistent fashion over the years. In the past, town moderators routinely allowed nonvoters to speak. J.A. 51, 146. Current Town Moderator and Respondent Thomas Gage, however, does not. Gage generally denies nonvoters the right to speak at town meetings, although his methods for doing so have varied. J.A. 37, 42-43. Sometimes he denies nonvoters the right to speak by executive fiat; at other times, he puts the issue to the voters.

For example, on May 26, 2005, the Town of Egremont held a special town meeting devoted to the proposed construction and financing of a new sewer system that would raise property taxes. J.A. 56. Before the nonvoters in attendance even had the opportunity to voice their desire to

speak, Gage called for a vote at the outset of the meeting as to whether nonvoters would be permitted to speak. J.A. 40. The majority of voters in attendance voted to deny nonvoters the right to speak, foreclosing Petitioners and many others like them the opportunity to be heard on this important matter of concern to all taxpayers. J.A. 56, 108.

Gage took a different approach at the May 2, 2006 annual town meeting. On the agenda at this meeting was a proposal to amend zoning laws to limit new commercial space to 10,000 square feet per lot. J.A. 116. When Petitioner Thomas F. Curnin and another man rose to speak, Gage told the other man that he would have to wait until later. J.A. 56. Gage never permitted the other man or Curnin to speak, however, because he recognized a call for a vote on the proposed zoning amendment, therefore concluding all discussion of the matter. J.A. 56.

Lower Court Proceedings

On May 2, 2006, Petitioners filed a complaint in the United States District Court for the District of Massachusetts seeking declaratory and injunctive relief under 42 U.S.C. § 1983, claiming that the Town of Egremont's policy of denying nonvoting taxpayers the same opportunity to speak at Town Meetings as that given to voters violated the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and similar provisions of the Massachusetts Constitution. App. 7a.[3]

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[3] The United States District Court for the District of Massachusetts had jurisdiction over the action pursuant to

On April 13, 2007, Petitioners moved for a preliminary injunction seeking to enjoin Respondents from denying them the opportunity to speak at Egremont Town Meetings, and in particular, the then-upcoming May 1, 2007 annual town meeting. J.A. 23-24. On April 25, 2007, a hearing was held on the motion. App. 17a. Believing that Petitioners had not shown a likelihood of success on the merits, the district court denied their motion for a preliminary injunction. J.A. 333.

Petitioners timely appealed the denial of their motion for a preliminary injunction to the United States Court of Appeals for the First Circuit. On November 29, 2007, the court of appeals issued its decision affirming the district court's decision. App. 3a. The opinion below is striking in its failure to apply any First Amendment scrutiny to Petitioners' claims. Contrary to other courts that have addressed speech restrictions at the local legislative level, the First Circuit held that "[public] forum analysis is inapposite because the town meeting is a legislative body in deliberation." App. 2a. According to the court, because Petitioners are not registered to vote in the Town of Egremont and therefore not town meeting legislators, "[t]he First Amendment does not give [them] the right to speak at meetings of deliberating legislative bodies, regardless of whether they own property or pay taxes." App. 2a. In reaching its conclusion, the court erroneously relied on *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984), in which

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28 U.S.C. §§ 1331 (federal question jurisdiction) and 1343 (civil rights jurisdiction).

this Court addressed speech rights in the context of a representative collective bargaining session, a situation vastly different than the one presented here involving a direct democracy open to the public such as the Egremont Town Meeting.

The court also rejected Petitioners' argument that Respondents violated the First Amendment by placing too much discretion over the speech rights of nonvoting taxpayers in the hands of the Town Moderator. As an initial matter, the court recognized that the Town Moderator exercised "a measure of discretion" with respect to the speech rights of nonvoting taxpayers. App. 16a. However, the court then ignored the First Amendment concerns raised by such discretion by requiring Petitioners to first make an evidentiary showing of viewpoint discrimination. App. 16a. The court's ruling that an evidentiary showing of viewpoint discrimination was required is directly contrary to a long line of authority from this Court and other courts, which holds that it is the *mere threat* of viewpoint discrimination that makes unbridled discretion in the hands of local officials problematic under the First Amendment. *See, e.g., City of Lakewood* v. *Plain Dealer Publishing Company*, 486 U.S. 750, 757 (1988) ("[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."). As this Court has warned, there will rarely be evidence of viewpoint discrimination because unbridled discretion allows state actors to mask such invidious practices in the first place. *See id.* at 760 ("[W]ithout

standards to bound the licensor, speakers denied a license will have no way of proving that the decision was unconstitutionally motivated . . . ."). Thus the decision below turns the unbridled discretion doctrine on its head.[4]

Relying on the First Circuit's broad ruling affirming the denial of preliminary injunctive relief, on December 10, 2007, the district court denied Petitioners' motion for summary judgment, granted Respondents' cross-motion for summary judgment, and entered judgment for Respondents. App. 24a.

REASONS FOR GRANTING THE WRIT

This case raises important questions about protecting the fundamental right to engage in political speech—speech that "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey* v. *Brown*, 447 U.S. 455, 467 (1980). Petitioners are not given the same opportunity to speak at Egremont Town Meetings as that given to locally-registered voters, despite the fact that they own property in the Town, receive essential services from the Town, and contribute to the Town's tax base. Under the Town's policy, Petitioners and other nonvoting taxpayers can be denied the opportunity to speak at town meetings for no reason or any reason on the whim of the Town Moderator. The court of appeals sanctioned this regime without subjecting the Town's policy to any First Amendment scrutiny, thereby effectively creating a First

[4] The court of appeals also rejected Petitioners' equal protection and due process claims. App. 15a n.5.

Amendment-free zone around New England town meetings. If the opinion below is allowed to stand, the First Amendment rights of Petitioners and many others like them to engage in political speech regarding the affairs of their community will continue to be suppressed in a large part of the country utilizing the town meeting form of local government.

Review is also warranted because the decision below conflicts with decisions of this Court and the Fourth, Fifth, Ninth and Tenth Circuit Courts of Appeals holding that unbridled discretion over speech rights in the hands of state actors raises First Amendment concerns. The decision below also ignored this Court's opinion in *City of Madison, Joint School District No. 8* v. *Wisconsin Employment Relations Commission*, establishing that "the participation in public discussion of public business cannot be confined to one category of interested individuals." 429 U.S. 167, 175 (1976). Finally, the decision below conflicts with decisions of the United States Courts of Appeals for the Ninth and Tenth Circuits, which have applied public forum analysis to similar speech restrictions at municipal-level legislative meetings. These conflicts regarding the doctrinal framework for analyzing speech restrictions on political speech at the local government level warrant this Court's attention.

I. This Proceeding Involves a Question of Exceptional Constitutional Importance: Whether the First Amendment Applies *Vel Non* to Open Town Meetings.

The speech in which Petitioners wish to engage involves the public affairs of the town where they reside, own property, pay taxes, and from which they receive essential services. Speech relating to such issues, *i.e.*, political speech, is at the core of First Amendment protection. As this Court has stated:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussion of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. *Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1966).

While the decision below recognized that Petitioners "have a legitimate interest in attempting to influence the policy choices made by the town of Egremont," App. 14a, it failed to recognize the importance of the political speech at issue and the high level of protection that such speech is accorded. This fundamental error by the lower court led it to eschew *any* First Amendment analysis of the speech restriction at issue. Rather than requiring Respondents to justify their speech restriction and then analyzing any justification under a constitutional framework, the

lower court broadly held that Respondents were immune from a First Amendment challenge.

The decision below has wide implications. It effectively closes the courthouse door to a First Amendment challenge involving any similar speech restriction at the local town meeting level of government, which is used throughout New England. *See, e.g.*, App. 3a ("[T]own meetings continue to exist in New England as a town's legislative arm and are responsible for the traditional legislative functions of making laws and controlling spending."); Massachusetts Moderators Association, *Town Meeting Time: A Handbook of Parliamentary Law* 1 (3d ed. 2001) ("The basic unit of local government in New England is the town. . . . The distinctive characteristic of town government . . . is the town meeting . . . in which are vested the traditional powers of the legislative branch of any level of government the power to make laws . . . and the power of the purse."); Robert J. Tilden, *Town Government*, 38 B.U. L. Rev. 347, 348 (1958) ("[T]his venerable form of local government affects the daily lives and pocketbooks of more people than at any time in history."); J.A. 254 (Citizen Information Service, *Citizen's Guide to Town Meetings*, http://www.sec.state.ma.us/cis/cistwn/twnidx.htm (last visited Apr. 4, 2008) ("Most but not all [Massachusetts] towns have Town Meetings.")).

Under the decision below, a significant number of people who have a direct interest in the public affairs of their town can be denied the opportunity to engage in political speech simply because they have chosen to vote elsewhere. Such widespread suppression of political speech

threatens the communication of ideas essential to a deliberative democracy such as ours. *See, e.g.*, *Cox* v. *Louisiana*, 379 U.S. 536, 552 (1965) ("Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy."). *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (recognizing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials").

Considering the importance of the speech at issue here and that such speech has historically been provided a generous amount of First Amendment protection, the petition for a writ of certiorari should be granted.

II. By Requiring Evidence of Viewpoint Discrimination as a Precondition to Addressing Petitioners' Unbridled Discretion Argument, the Decision Below Conflicts with Decisions of this Court and Other Courts of Appeals.

It is undisputed that the Town Moderator exercises wide discretion in determining whether to allow nonvoting taxpayers such as Petitioners to speak at Egremont Town Meetings. There is no statute, by-law, or policy (whether written or unwritten) to guide the moderator's discretion. The current Town Moderator admitted that whether he permits nonvoting taxpayers to speak at town meetings "depends on the situation" or "the issue." J.A. 34. The problem with placing

such unbridled discretion in the hands of the Town Moderator is that he can make his decisions based upon the views he expects the non-voting taxpayer to express—and no one would really know that he is doing so.

The court below recognized the wide discretion enjoyed by the Town Moderator, App. 16a, but erroneously swept aside the serious First Amendment concerns implicated by this standardless scheme. In rejecting Petitioners' unbridled discretion argument, the court of appeals ruled that there was "no evidence" that the Town Moderator had used such discretion to engage in viewpoint discrimination. App. 16a. By requiring an evidentiary showing of viewpoint discrimination, however, the First Circuit missed the whole point of the unbridled discretion doctrine. A long line of authority from this Court holds that it is the *mere threat* of viewpoint discrimination that makes unbridled discretion in the hands of a local official unconstitutional, not actual evidence of viewpoint discrimination, which is often difficult if not impossible to show in these circumstances. For example, in *Forsyth County, Georgia* v. *The Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992), this Court stated that "the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." This is because "without standards to bound the licensor, speakers denied a license will have no way of proving that the decision was uncon-

stitutionally motivated, and, faced with that prospect, they will be pressured to conform their speech to the licensor's unreviewable preference." *City of Lakewood*, 486 at 760. *See also id.* at 757 ("[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."); *Niemotko* v. *State of Maryland*, 340 U.S. 268, 285 (1951) ("The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance an action appears not arbitrary does not save the validity of the authority under which the action was taken."); *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.").

The opinion below also conflicts with decisions of the Fourth, Fifth, Ninth and Tenth Circuits, which faithfully adhere to this Court's authority on this issue. *1126 Baltimore Boulevard, Inc.* v. *Prince George's County, Maryland*, 58 F.3d 988, 994 (4th Cir.), *cert. denied*, 516 U.S. 1010 (1995) ("Without the constraint of specific standards to guide the decisionmaker . . . an impermissible danger exists that a government official may decide to exercise his judgment to suppress speech he personally finds distasteful or that an applicant may feel compelled to censor his own speech."); *Beckerman* v. *City of Tupelo, Mississippi*, 664 F.2d 502, 506-07 (5th Cir. 1981) ("In the case of a licensing statute containing allegedly excessive discretion, facial challenges

are permitted because the mere existence of such discretion is unconstitutional. . . . Appellants need not argue that there has been an abuse of discretion as a prerequisite to a facial attack."); *Gaudiya Vaishnava Society* v. *City and County of San Francisco*, 952 F.2d 1059, 1066 (9th Cir. 1991), *cert. denied*, 504 U.S. 914 (1992) ("Such discretion grants officials the power to discriminate and raises the spectre of selective enforcement on the basis of content of speech.") (internal quotation and citation omitted); *Association for Community Organizations for Reform Now* v. *Municipality of Golden, Colorado*, 744 F.2d 739, 747 (10th Cir. 1984) ("Vesting . . . authority with this discretion permits the government to control the viewpoints that will be expressed. Whether the city council or the police exercises this power" is irrelevant.).

That these cases usually arise in the licensing context does not foreclose Petitioners' unbridled discretion argument, as the court below erroneously thought. *See* App. 16a. As an initial matter, the Town Moderator's role regarding speech rights is no different than other local officials in the licensing arena. The Town Moderator decides on the spot who does and who does not get to speak. If anything, that the unbridled discretion exists to chill political speech at a town meeting weighs in favor, not against, the doctrine's application here. Moreover, other courts have applied First Amendment unbridled discretion analysis outside the licensing context. *See, e.g., United States* v. *Crowthers*, 456 F.2d 1074, 1080 (4th Cir. 1972) (applying unbridled discretion analysis to a disorderly conduct regulation); *Long*

Island Vietnam Moratorium Committee v. *Cahn*, 437 F.2d 344, 350 (2d Cir. 1970), *aff'd*, 418 U.S. 906 (1974) (applying unbridled discretion analysis to a statute that made it a misdemeanor to display any word, figure, mark, picture, design, drawing or advertisement upon any flag, standard, color, shield, or ensign of the United States or the State of New York).

Considering the conflict created by the First Circuit's adoption of a requirement that an affirmative showing of viewpoint discrimination is necessary to challenge a state actor's unbounded discretion to suppress speech about public affairs, the petition for a writ of certiorari should be granted.

III. In Declining to Engage in a Public Forum Analysis, the Decision Below Conflicts with this Court's Decision in *City of Madison* and Authoritative Rulings in the Ninth and Tenth Circuit Courts of Appeals.

In broad and sweeping terms, the First Circuit declined to apply any public forum analysis to the speech restriction at issue. Instead, the court accepted Respondents' argument that, because the Egremont Town Meeting is a legislative body and Petitioners are not legislators, they have no First Amendment rights when it comes to the town meeting. App. 11a. Accordingly, the court "reject[ed] forum analysis entirely as an inappropriate model to apply to deliberations of a town legislative body." App. 10a (footnote omitted). In doing so, the First Circuit ignored this Court's decision in *City of Madison*.

In *City of Madison*, this Court made clear that "the participation in public discussion of public business cannot be confined to any category of interested individuals." 429 U.S. at 175. At issue was whether a public school teacher who was not a union representative could address school board meetings regarding pending collective bargaining negotiations despite a Wisconsin law forbidding the school teacher from doing so. *Id.* at 169. Finding that the teacher had a right to address the school board meeting, this Court stated that "[t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *Id.* at 175-76. According to this Court, "[w]here the State has opened a forum for direct citizen involvement, it [was] difficult to find justification for excluding teachers who ma[d]e up the overwhelming proportion of school employees and who [were] most vitally concerned with the proceedings." *Id.* at 175. Therefore, "[w]hatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it [could] not be required to discriminate between speakers on the basis of their employment, or the content of their speech." *Id.* at 176.

Here, Petitioners are similar to the public school teachers in *City of Madison*. The Egremont Town Meeting is a "forum for direct citizen involvement" to which the public is invited to attend. Furthermore, as an open town meeting whose composition cannot be determined until the meeting is called to order, it is the only adequate venue for Petitioners and others like them

to communicate their views regarding local affairs. Unlike a representative legislature, there are no elected officials for Petitioners to lobby. There is no justification for denying nonvoting taxpayers the same opportunity to speak at town meetings as that given to other Town residents when they too are vitally concerned with the proceedings and connected to the community.

The First Circuit mistakenly looked to this Court's opinion in *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984), to support its view that forum analysis is inapposite here. App. 11a-12a. At issue in *Knight* was a state law restricting the right of public employers to "meet and confer" about non-mandatory bargaining subjects with only the exclusive representatives of their employees' bargaining unit. *Id.* at 274-75. According to this Court, the case was about a supposed "constitutional right of faculty to participate in policy-making in academic institutions." *Id.* at 287. At issue here, however, is the fundamental right of every American citizen to engage in political speech regarding the affairs of his or her community. Thus the issues confronted in *Knight* involving teachers and collective bargaining are vastly different on the constitutional scale than those here. Furthermore, in *Knight*, this Court distinguished *City of Madison*. As explained by the Court, because *Knight* "involve[d] no selective closure of a generally open forum . . . any reliance on the *City of Madison* case would [have been] misplaced." *Id.* at 281. That is not the case here. Here, as in *City of Madison*, there is a selective closure (to nonvoting taxpayers) of a

generally open forum (the Egremont Town Meeting).

The decision below also conflicts with authoritative decisions of the United States Courts of Appeals for the Ninth and Tenth Circuits that applied public forum analysis in the context of local legislative meetings. In *Kindt* v. *Santa Monica Rent Control Board*, 67 F.3d 266, 270 (9th Cir. 1995), the Ninth Circuit held that public forum analysis should be applied in evaluating discriminatory restrictions on speech in the context of a rent control board meeting and found the meeting to be a nonpublic forum. And in *Mesa* v. *White*, 197 F.3d 1041, 1044 (10th Cir. 1999), the Tenth Circuit likewise concluded that public forum analysis should be applied in evaluating discriminatory restrictions on speech in the context of a county commission meeting and found the meeting to be a designated public forum.

In contrast to these decisions, the First Circuit rejected public forum analysis out of hand. The court below attempted to distinguish cases like *Kindt* and *Mesa* by noting that they "involve[d] municipal-level public meetings that allowed members of the public to speak during designated portions of the meetings but shut out certain speakers during those portions." App. 12a. The First Circuit failed to recognize that the municipal meetings at issue in those decisions involved *representative* legislatures, not a form of direct democracy such as the Egremont Town Meeting. This distinction is critical. As an open town meeting, the Egremont Town Meeting does not need to have a "formal" public comment

period that is typical in representative bodies, such as those at issue in *Kindt* and *Mesa*. In an open town meeting, comments are permitted throughout the duration of the meeting regarding the matters set forth in the warrant and subject to the Town Moderator's duty to maintain order. *See* J.A. 262 (Citizen Information Service, *Citizen's Guide to Town Meetings*, http://www.sec.state.ma.us/cis/cistwn/twnidx.htm (last visited Apr. 4, 2008) ("If you wish to speak, stand up and wait for the moderator to acknowledge you.")). The decision below leads to an incongruous conflict among United States Courts of Appeals: discriminatory restrictions on speech in the context of local legislative meetings are generally subject to a public forum analysis, but not in the First Circuit, where ironically town meetings are open to the public "and often considered an exemplar of pure democracy." App. 3a.

In light of the conflict created by the First Circuit's refusal to apply a public forum (or any other First Amendment) analysis to the speech restriction at issue, the petition for a writ of certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 8, 2008

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-1876
Heard Nov. 7, 2007
Decided Nov. 29, 2007

MIRIAM CURNIN; THOMAS F. CURNIN,

Plaintiffs-Appellants,

—v.—

TOWN OF EGREMONT; THOMAS GAGE, Town Moderator; BRUCE TURNER, Board of Selectmen; PHILIP REILLY, Board of Selectmen; MARY BRAZIE, Board of Selectmen,

Defendants-Appellees.

Landis C. Best with whom Judith C. Knight, Joseph H. Zwicker, Choate Hall & Stewart LLP, Nicholas Boski, and Cahill Gordon & Reindel LLP were on brief for appellants.

Nancy Frankel Pelletier with whom David S. Lawless and Robinson Donovan, P.C. were on brief for appellees.

Before LYNCH, Circuit Judge, CAMPBELL and SELYA, Senior Circuit Judges.

LYNCH, Circuit Judge.

This case raises First Amendment questions about limiting the participation of non-voters at a New England town meeting.

Miriam and Thomas Curnin, who own property but are not registered to vote in the town of Egremont, Massachusetts, appeal from the district court's refusal to grant a preliminary injunction mandating that they be permitted to speak at Egremont's town meeting. The Curnins contend that the town meeting is a designated public forum and Egremont's policy of permitting non-voters like themselves, who own property and pay taxes but are not town meeting members, to speak only at the discretion of the town meeting and its moderator violates their First Amendment rights.

We hold that forum analysis is inapposite because the town meeting is a legislative body in deliberation. The Curnins are not registered to vote in Egremont and therefore are not town meeting legislators. The First Amendment does not give non-legislators the right to speak at meetings of deliberating legislative bodies, regardless of whether they own property or pay taxes.

We also reject the Curnins' arguments that Egremont has engaged in viewpoint discrimination and that the First Amendment is violated by

the discretion vested in the town meeting moderator to recognize speakers, including individuals not members of the town meeting. We affirm the district court's denial of a preliminary injunction.

I.

The New England town meeting is a special form of government dating back to the colonial era and often considered an exemplar of pure democracy. *See* R. Tilden, *Town Government,* 38 B.U. L.Rev. 347, 348 (1958).

Town meetings in colonial times were charged with administrative and judicial as well as legislative duties. R. Johnson et al., *Town Meeting Time: A Handbook of Parliamentary Law* 4 (3d ed. 2001). Membership in town meetings was limited to those who belonged to the established church and owned the requisite amount of property. Tilden, *supra,* at 356. Attendance was compulsory, and those who arrived late were punished with a fine. Johnson et al., *supra,* at 3.

Other forms of government have emerged to carry out local administrative and judicial functions since the colonial era. *Id.* at 4. But town meetings continue to exist in New England as a town's legislative arm and are responsible for the traditional legislative functions of making laws and controlling spending. *Id.* One commentator notes that a town meeting's "votes in municipal government correspond to those of the General Court [state legislature] in the state government

and of the Congress in the national government."[1] Tilden, *supra*, at 349.

In towns using a representative town meeting, registered voters who are not town meeting members can speak "subject to conditions prescribed by the meeting." Sec'y of the Commonwealth, Citizen Info. Serv., *Citizen's Guide to Town Meetings, available at* http://www.sec.state.ma.us/cis/cistwn/twnidx.htm.

Massachusetts law requires that, unless otherwise provided, each town must hold an annual town meeting in February, March, April, or May. Mass. Gen. Laws ch. 39, § 9. Special town meetings are called if a question arises requiring legislative action before the next annual meeting. At least seven days before annual town meetings and at least fourteen days before special town meetings, a town's selectmen must issue a warrant setting forth the time and location of the meeting and the subjects to be addressed. *Id.* § 10. Each town sets its own quorum for town meeting business. *Id.* § 13. A moderator elected by the town's voters is responsible for

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[1] That correspondence admits of one distinction. The town meeting may embody either direct democracy or representative democracy; the other two embody representative democracy. In the early twentieth century, some towns started to find open town meetings "unwieldy and often unrepresentative of a cross-section of the town population" and therefore replaced them with representative town meetings. Johnson et al., *supra*, at 6. In a town with a representative meeting, only elected town meeting members can vote at town meeting, although all registered voters may attend. *Id.* at 7. Today, a town with a population over 6,000 may establish a representative town meeting. Mass. Const. art. LXXXIX.

"presid[ing] and regulat[ing] the proceedings" and "decid[ing] all questions of order." *Id.* §§ 14, 15. All of a town's registered voters can speak and vote at town meeting, unlike the colonial requirements tying town meeting participation to property ownership and church membership. *Id.* § 18; Sec'y of the Commonwealth, Citizen Info. Serv., *Citizen's Guide to Town Meetings, available at* http://www.sec.state.ma.us/cis/cistwn/twnidx.htm [hereinafter *Citizen's Guide*]. Non-voters can attend and can speak "at the discretion of the moderator or Town Meeting." *Citizen's Guide, supra.*

Egremont is a small town in western Massachusetts that employs an open town meeting, not a representative town meeting, as its legislative body. As of 2006, it had a population of 1032, with 875 registered voters.

Egremont's bylaws supplement the state requirements by providing that all warrants be posted in at least four public places within the town at least fourteen days before the town meeting is scheduled to occur; if a special town meeting is called, the selectmen must place a synopsis of the warrant in the local newspaper at least fourteen days before the meeting. Sixty voters must be present at town meeting in order for a quorum to exist.

Egremont's current moderator, Thomas Gage, has adopted a policy of separating voters from non-voters by giving voters colored placards. (Under a previous moderator, non-voters were seated in a separate section of the room.) Unless constrained by a contrary vote of the town meeting members, the moderator has the discretion to

determine whether non-voters who wish to speak may do so. The moderator follows the rules of order set forth in *Town Meeting Time*. For example, if there is an appropriate motion to call the vote, there is no further discussion before the vote. Thus, even the right of town meeting members to speak is qualified.

The Curnins own a house and pay taxes on it and approximately 120 acres of land in Egremont, but they are not registered to vote there. They also have a residence in Larchmont, New York, where they are registered to vote.

The Curnins point to three specific town meetings at which they assert they were prevented from speaking on issues important to them as taxpayers. At the beginning of a special town meeting to consider a proposed sewer project on May 26, 2005, a motion was made to allow non-voters to speak. This motion failed by a vote of 100 to 67. The sewer proposal was defeated, in a quick succession of motions, without any discussion or debate by either voters or non-voters.

At the annual town meeting on May 2, 2006, Thomas Curnin and another non-voter rose to speak on a proposal to amend the town's zoning laws to limit new commercial space to 10,000 square feet. Moderator Gage told the other non-voter who wished to speak to wait and that he would be considered later. At that point, town meeting members called for a vote on the zoning law amendment; there were no further comments from either voters or non-voters.

At a special town meeting on June 21, 2006, voters considered whether to spend $350,000 on a new fire truck for the town. Curnin asserts that

he wanted to speak about the propriety of the bid the town received for the truck, although he does not seem to have made his desire to speak known. Moderator Gage called for a vote regarding the purchase of the truck after asking two voters who were about to leave to delay their exit because a quorum would not exist without them.

On May 2, 2006, the Curnins sought declaratory and injunctive relief in federal district court under 42 U.S.C. § 1983, claiming that Egremont's policy of not permitting non-voters who own property and pay taxes to speak at town meetings violates their rights under the First and Fourteenth Amendments of the United States Constitution and similar provisions of the Massachusetts Constitution.[2]

On April 13, 2007, the Curnins filed a motion for a preliminary injunction to force Egremont to permit them to speak at its annual town meeting on May 1, 2007. The district court denied the injunction in an oral opinion issued on April 25, 2007. The district court emphasized that it did not "see how the ownership of property and the payment of taxes gives someone who is a non-voting member of the town a status equal to voting members when it comes to speaking at town meetings." The district court also expressed skepticism about the Curnins' arguments that Egremont engages in viewpoint discrimination by allowing voters but not non-voters to speak and

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[2] The named defendants are the Town of Egremont; Gage, Egremont's town meeting moderator; and the town's three selectmen, Mary Brazie, Bruce Turner, and Philip Reilly. Reilly has since died and been dismissed from the case.

that the discretion in the moderator to decide when a non-voter can speak creates a First Amendment violation. This timely appeal followed.

Although the May 2007 town meeting has now passed, Egremont's policy has not changed, nor has the Curnins' desire to speak at future town meetings.

II.

We review the denial of a preliminary injunction for abuse of discretion. *Rivera-Feliciano v. Acevedo-Vila,* 438 F.3d 50, 63 (1st Cir.2006). There are no questions of fact in dispute, so the only issues are ones of law.

The district court correctly considered four factors in determining whether to issue a preliminary injunction: "(1) the likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest." *Bl(a)ck Tea Soc'y v. City of Boston,* 378 F.3d 8, 11 (1st Cir.2004) (quoting *Charlesbank Equity Fund II v. Blinds To Go, Inc.,* 370 F.3d 151, 162 (1st Cir.2004)) (internal quotation marks omitted).

We turn to whether the Curnins have demonstrated a probability of success on their First Amendment claims. We engage in de novo review in First Amendment cases of the district court's conclusions of law and mixed questions of law

and fact. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995).

The Curnins argue that the district court erred by not analyzing Egremont's town meeting using the methodology of forum analysis. Forum analysis primarily concerns the use of government property for speech, and the extent to which government can restrict speech turns on the category to which property is assigned. E. Chemerinsky, *Constitutional Law* 1126-27 (3d ed.2006). The Supreme Court has distinguished several types of forums, including traditional public forums, designated public forums, and non-public forums. *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76 (1st Cir.2004). This circuit has used the phrase "limited public forums" to describe non-public forums, *id.* at 76 n. 4, and we adhere to that usage here.

The Curnins first argue that Egremont's town meeting qualifies as a designated public forum for two reasons. First, they argue that Egremont's town meetings must be public forums because they are open to the public,[3] take place on government property, and involve important

[3] The Curnins are incorrect in their subsidiary assertion that Massachusetts's open meeting requirement applies to town meetings. It is true that state law provides that "[a]ll meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting," Mass. Gen. Laws ch. 39, § 23B, but town meetings are specifically excluded from the definition of governmental bodies, *id.* § 23A (providing in the definition of "governmental body" that "this definition shall not include a town meeting"). However, the Curnins are correct in that town meetings are open to the public. *Citizen's Guide, supra.*

matters of public interest. Second, they argue by analogy that other courts have held that municipal-level public meetings are designated public forums and therefore town meetings are as well. They further argue that even if the town meeting is not considered a designated public forum but only a limited public forum, Egremont's policy cannot satisfy the corresponding level of scrutiny.

The Curnins make a second and separate series of First Amendment arguments under the rubric of viewpoint-related discrimination. They assert that the categorical preclusion of those who are not town meeting members from the right to speak is a form of viewpoint discrimination. They also argue that Egremont's policy of letting non-voters speak only at the discretion of the moderator is unconstitutional. They further argue that this discretion raises the prospect of possible viewpoint discrimination by the moderator in his decision to recognize certain people and not others.

The Curnins' first group of arguments, based on forum analysis, is incorrect under First Amendment doctrine. Forum analysis of any sort is inapposite in the context of complaints about the deliberations of a legislative body, as Egremont's town meeting is. We reject forum analysis entirely as an inappropriate model to apply to the deliberations of a town legislative body.[4] The

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[4] Even were we to apply the forum analysis model, we would hold, similar to the Supreme Court's analysis in *United States v. Am. Library Ass'n*, 539 U.S. 194, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003), that "the public forum prin-

registered voters who speak and vote at Egremont's town meeting do so in their capacity as legislators. Since they are not registered voters, the Curnins are not legislators. Non-legislators have no First Amendment right to address sessions of deliberating legislative bodies.

The Supreme Court has never extended First Amendment forum analysis to a deliberating legislative body or to the body's rules about who may speak. While no Supreme Court case is directly on point, the Court has addressed the underlying issue of the public's ability to address government policymakers:

> The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy. . . . Policymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted. . . . Public officials at all levels of government daily make policy decisions based only on the advice they decide they need and choose to hear. To recognize a constitutional right to participate directly in government policymaking would work a revolution in existing government practices.

Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 283-84, 104 S.Ct. 1058, 79 L.Ed.2d 299

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ciples on which [plaintiffs rely] are out of place in the context of this case. [Town meetings are] neither a traditional nor a designated public forum." *Id.* at 205, 123 S.Ct. 2297.

(1984). In *Knight*, the Court rejected First Amendment claims by plaintiffs that they had a right to force officers of the state, acting in an official capacity, to listen to them in a particular formal setting. *Id.* at 283, 104 S.Ct. 1058.

The Curnins' next forum-related argument, which proceeds by analogy, fails because the cases they cite involve municipal-level public meetings that allowed members of the public to speak during designated portions of the meetings but shut out certain speakers during those portions. *See Mesa v. White*, 197 F.3d 1041, 1043 (10th Cir.1999) (former county commissioner prevented from speaking during public comment period of county commission meeting); *Piscottano v. Town of Somers*, 396 F.Supp.2d 187, 193-94 (D.Conn.2005) (resident concerned about town official's behavior prevented from speaking during public comment portion of Board of Selectmen meeting); *Scroggins v. City of Topeka*, 2 F.Supp.2d 1362, 1365-66 (D.Kan.1998) (resident cut off while attempting to criticize mayoral appointment during public comment portion of city council meeting); *Pesek v. City of Brunswick*, 794 F.Supp. 768, 774 (N.D.Ohio 1992) (resident prevented from speaking during public comment portion of city council meeting on grounds that he was also a town employee). The Curnins have not identified any comparable public comment period at Egremont's town meeting.

More generally, the fact that the town meeting is a deliberating legislative body implicates the principle that courts are reluctant to interfere with the rules and procedures adopted by legislatures. Under the Speech or Debate Clause of

the U.S. Constitution, Article I, section 6, there are constitutional separation of powers protections for Congress. *See, e.g., Eastland v. U.S Servicemen's Fund,* 421 U.S. 491, 502, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975) ("The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently."); *Gravel v. United States,* 408 U.S. 606, 616, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972); *see also* L. Tribe, *American Constitutional Law* 370 (2d ed.1988). This immunity extends to injunctive relief. *Eastland,* 421 U.S. at 503, 95 S.Ct. 1813. No explicit federal constitutional protections cover state or local legislative bodies. However, there are still federalism and separation of powers concerns, which have led to the adoption of similar immunities for state legislators. *See Knight,* 465 U.S. at 285, 104 S.Ct. 1058; *Nat'l Ass'n of Soc. Workers v. Harwood,* 69 F.3d 622, 629 (1st Cir.1995) (citing *Supreme Court of Va. v. Consumers Union of the U.S., Inc.,* 446 U.S. 719, 732-33, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980)).

Regardless of whether it could be of constitutional dimension, no concern is raised in this case of plaintiffs having been excluded from any meaningful opportunity to make their views known to the voters. The Curnins concede there are alternative ways to make their views known, but argue that the most effective method of influencing votes is speaking at town meeting. They argue that because there is no guarantee which registered voters will attend a particular town meeting, they cannot influence the town meeting because they cannot be certain that the voters

they lobby will ultimately attend. Still, however, there are a wide variety of ways to lobby town meeting members who are likely to attend outside the meeting itself, and uncertainty as to individual attendance is a problem shared with legislators at any level of government, including Congress.

The Curnins have a number of other means of influencing local decisionmaking, both formal and informal, available to them. All members of the public can speak at meetings of Egremont's Board of Selectmen, and Thomas Curnin has in fact spoken at such meetings in the past. The selectmen play a significant role in town governance in general as well as in town meetings in particular: they issue the warrants that determine town meeting agendas and make recommendations to town meeting regarding each item in the town's budget. The Curnins are also free to attend and speak at the public forums that are held in Egremont from time to time for discussion of important issues. For instance, such public forums were held on the proposed sewer system prior to the town meeting at which it was discussed. Additionally, the Curnins have less formal means of influence available to them, including writing letters to the editor of the local newspaper, taking out advertisements in the local newspaper, and sending mailings to voters.

There is no doubt the Curnins have a legitimate interest in attempting to influence the policy choices made by the town of Egremont. That does not create a right to speak before a legislative body. Our analysis does not change, as the Curnins contend, because Egremont's town meet-

ing embodies direct rather than representative democracy; members of the town meeting are still legislators.

We turn to the viewpoint discrimination argument, which has several levels. The Curnins first argue that Egremont engages in viewpoint discrimination by granting different speaking rights to voters and non-voters. This claim fails. The distinction between those who are and are not town meeting members is not based on viewpoint at all. In fact, the distinction between giving qualified speaking rights to legislators, but not to non-legislators, is entirely rational. The legislative body has limited time to get its work done. Indeed, the distinction made is entirely content-neutral.[5] In their second level of potential discrimination claims based on viewpoint, the Curnins argue that the moderator has an impermissible amount of discretion, in violation of the First Amendment. They rely on an analogy to the licensing context, where the Supreme Court has struck down schemes giving public officials excessive discretion in making decisions such as when to issue permits for demonstrations and parades. *See, e.g., City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) (striking down scheme giving mayor complete discretion in deciding whether to issue permits for newspaper

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[5] The equal protection claim asserted by the Curnins adds nothing to their case. This case also does not involve restrictions based on the subject matter or nature of speech in a public forum. *Cf. Carey v. Brown*, 447 U.S. 455, 459-61, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). Likewise, their due process claim is futile.

dispensing machines on public property). These cases are different in kind. They do not involve speech before deliberating legislative bodies.

In such bodies, some measure of discretion is inherent in the role of the moderator. The moderator is charged with facilitating an efficient and orderly town meeting. As the Massachusetts Supreme Judicial Court put it: "A moderator must make judgments on the spot. He must deal with disputants without the protective formality of a judicial proceeding, and he must contend with voters who are not necessarily experienced in the law or conversant with town meeting procedures." *MacKeen v. Town of Canton*, 379 Mass. 514, 399 N.E.2d 22, 24 (1980).

To the extent the Curnins suggest that the moderator's discretion could enable him to engage in viewpoint discrimination, there is no evidence of any such behavior here. No evidence has been presented to suggest that Egremont is attempting to "give one side of a debatable public question an advantage in expressing its views," *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). We need not consider whether there is any cognizable constitutional claim raised if a moderator of a legislative body were to allow non-voters to speak for a limited period but then call on speakers representing only one side of an issue. Nor is there any evidence that the government was preferring only the views of the present administration of the town. The facts raise neither claim.

The judgment of the district court denying preliminary injunctive relief is *affirmed*.

United States District Court
District of Massachusetts (Springfield)
CIVIL DOCKET FOR CASE #: 3:06-cv-30069-MAP
(Excerpt)

Curnin et al v. Town of Egremont et al
Assigned to: Judge Michael A Ponsor
Case in other court: U.S. Court of Appeals, 07-01876
Cause: 42:1983 Civil Rights Act
Date Filed: 05/02/2006
Date Terminated: 12/10/2007
Jury Demand: Defendant
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

04/25/2007	ElectronicClerk's Notes for proceedings held before Judge Michael A Ponsor: Motion Hearing held on 4/25/2007 re 29 MOTION for Preliminary Injunction filed by Miriam Curnin, Thomas F. Curnin. After hearing the motion is DENIED. (Court Reporter Philbin & Assoc.) (Stuckenbruck, John) (Entered: 04/26/2007)
04/26/2007	Judge Michael A Ponsor: ENDORSED ORDER entered denying 29 Motion for Preliminary Injunction. DENIED, Based on plaintiff's inability to demonstrate a likelihood of success on the

merits, for the reasons stated in open court. So ordered. cc/cl (Lindsay, Maurice) (Entered: 04/26/2007)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 07-1876

MIRIAM CURNIN; THOMAS F. CURNIN,

Plaintiffs-Appellants

—v.—

TOWN OF EGREMONT; THOMAS GAGE, Town Moderator; BRUCE TURNER, Board of Selectmen; PHILIP REILLY, Board of Selectmen; MARY BRAZIE, Board of Selectmen,

Defendants-Appellees

Before: Boudin, *Chief Judge*, Campbell, Torruella, Selya, Lynch, Lipez and Howard* *Circuit Judges*.

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* Judge Howard is recused and did not participate in the consideration of this matter.

ORDER OF COURT

Entered: January 9, 2008

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter
Margaret Carter,
Chief Deputy Clerk

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

C.A. No. 06-30069-MAP
December 10, 2007

MIRIAM CURNIN, *et al*,

Plaintiffs,

—v.—

TOWN OF EGREMONT, *et al*,

Defendants.

MEMORANDUM AND ORDER
REGARDING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT AND
DEFENDANTS' MOTION TO STRIKE
AND MOTION FOR SUMMARY JUDGMENT
(Dkt. Nos. 62, 70, 71)

PONSOR, D.J.

Plaintiffs, property owners in the Town of Egremont, Massachusetts, have brought this lawsuit, contending that Egremont's town meeting is

a public forum and that Egremont's policy of permitting non-voters like themselves to speak only at the discretion of the town meeting moderator violates their First Amendment rights. Alternatively, they argue that the limitation on their right to speak constitutes forbidden viewpoint discrimination.

On April 13, 2007, Plaintiffs filed a Motion for Preliminary Injunction. The court denied this motion orally on April 26, 2007, finding that Plaintiffs had not demonstrated a likelihood of success on the merits.

Plaintiffs appealed, and on November 29, 2007 the Court of Appeals issued its opinion affirming this court's ruling. Although the First Circuit's review was titularly limited to the district court's ruling on the Motion for Preliminary Injunction, the language of Judge Lynch's opinion made the court's rejection of Plaintiffs' theory of recovery very clear.[1]

The first page of the opinion noted that Egremont's town meeting is a legislative body and that Plaintiffs are not town meeting legislators. The court then held that "[t]he First Amendment does not give non-legislators the right to speak at meetings of deliberating legislative bodies, regardless whether they own property or pay taxes." *Curnin v. Town of Tremont*, No. 07-1876 (1st Cir. Nov. 29, 2007), slip op. at 2.

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[1] In addition to rejecting the constitutional basis for Plaintiffs' First Amendment claim, the First Circuit rejected Plaintiffs' equal protection and due process claims. *Curnin v. Town of Egremont*, No. 07-1876 (1st Cir. Nov. 29, 2007). slip op. at 15 n.5.

The import of the First Circuit's opinion affirming denial of the Motion for Preliminary Injunction is that Plaintiffs' claims have no constitutional force, and that Defendants' Motion for Summary Judgment must be allowed. For this reason, the court hereby DENIES Plaintiffs' Motion for Summary Judgment (Dkt. No. 62) and ALLOWS Defendants' Motion for Summary Judgment (Dkt. No. 71). The clerk is ordered to enter judgment for Defendants. This case may now be closed.[2]

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U. S. District Judge

[2] The court has by marginal notation denied Defendants' Motion to Strike (Dkt. No. 70), as moot. It is true that (with the greatest respect for Prof. Fowler) it is highly unlikely that the court would have permitted plaintiff's expert to testify, had this case gone to trial. Nevertheless, even considering all the evidence Defendants seek to strike, the court would still allow Defendants' Motion for Summary Judgment.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 3:06-30069-MAP

MIRIAM CURNIN, *et al*,
Plaintiff(s)

—v.—

TOWN OF EGREMONT, *et al*,
Defendant(s)

Judgment In A Civil Case

Michael A. Ponsor. D.J.

[ ] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

It Is Ordered And Adjudged

Judgment entered for the defendants Town of Egremont, et al, against the plaintiffs Miriam Curnin, et al, pursuant to the court's memorandum and order entered this date, granting defendant's motion for summary judgment.

Sarah A. Thornton,
Clerk Of Court

Dated: December 10, 2007

By /s/ Maurice G. Lindsay
Maurice G. Lindsay
Deputy Clerk

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(2)

No. 07-1279

FILED
MAY 12 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MIRIAM CURNIN, *et vir.*,

Petitioners,

v.

TOWN OF EGREMONT, MASSACHUSETTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the lower courts err in holding that petitioners failed to establish a likelihood of success on the merits on their claim to an entitlement to an audience for their views at annual and special sessions of the Egremont Town Meeting, a duly constituted legislative body, based on petitioners' status as part-time residents and property owners who are not registered to vote in the Town of Egremont and are, therefore, not legislators?

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INTRODUCTION

Petitioners have presented no "compelling reasons" as to why their Petition for a Writ of Certiorari ("Petition") should be granted. *See* Sup. Ct. R. 10. Specifically, petitioners fail to demonstrate that the United States Court of Appeals for the First Circuit's Opinion of November 29, 2007 ("Opinion") affirming the district court's order denying preliminary injunctive relief is in conflict with a decision of this Court or another court of appeals or that the First Circuit decided an important federal question which has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). The Petition should be denied.

STATEMENT OF THE CASE

A. Lower Court Proceedings.

Almost a year after filing their original complaint on May 2, 2006, petitioners moved for a preliminary injunction, on April 13, 2007. J.A. 5, 9.[1] The district court denied petitioners' motion for a preliminary injunction on April 25, 2007. Pet. App. at 17a-18a.[2] The petitioners appealed the denial of their motion for a preliminary injunction and the United States Court of Appeals for the First Circuit affirmed the district court's decision on November 29, 2007. *See* Pet. App. at 1a-16a.

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1. References to "J.A." are to the appendix of record materials filed with the court of appeals.

2. References to "Pet. App." are to the appendix to the Petition.

On December 10, 2007, the district court denied petitioners' motion for summary judgment, allowed respondents' cross motion for summary judgment, and entered judgment for the respondents. Pet. App. at 22a-26a. Petitioners did not appeal the final judgment dismissing the case.

Instead, petitioners filed a petition for rehearing *en banc* with the United States Court of Appeals for the First Circuit. The court of appeals denied the petitioners' petition for rehearing *en banc* on January 9, 2008. Pet. App. at 19a-20a. On April 8, 2008, petitioners filed the instant Petition.

B. The Petition Omits Significant Facts.

Respondents submit that the Petition omits various facts which are significant to the resolution of this action.

On May 26, 2005, a Special Town Meeting was held at which Warrant Article 1 required the Special Town Meeting to consider whether "to have the town establish a sewer system for the Town of Egremont and to authorize the Board of Selectmen to act as sewer commissioners until such board has been elected and qualified." *See* J.A. 176. Prior to this Special Town Meeting, public forums were held on this issue at which anyone could speak. *See* J.A. 186-187. Thomas F. Curnin did not attend these meetings, although he has attended other public forums and has spoken at Select Board meetings. *See* J.A. 196-198.

At the May 26, 2005 Special Town Meeting, a vote was held to determine whether or not non-voters would

be allowed to speak at the meeting. J.A. 206-207. The Town Meeting voted to not allow non-voters to speak. J.A. 176.

According to Thomas F. Curnin, immediately after that vote a Mr. Lamme made series of motions which culminated in a motion for a vote on the warrant article. J.A. 193-194; J.A. 200-201. As a result, neither voters nor non-voters spoke on or debated the warrant article under consideration. *See* J.A. 193; Pet. App. at 6a. Warrant Article 1 was defeated by a majority hand count vote. J.A. 176.

Thomas F. Curnin never communicated to anyone prior to the May 26, 2005 Special Town Meeting that he desired or intended to speak at this Special Town Meeting. J.A. 192.

At the Annual Town Meeting held on May 2, 2006, the Egremont Town Meeting considered a proposed zoning by-law amendment. Pet. App. at 6a. A non-voter went to the microphone and stated that he was a non-voter and that he had a business in Egremont. J.A. 184. This individual was told to wait until the voters had had a chance to speak. *Id.* However, immediately following this request, "the question was called [by the voters] and the issue was voted on." *Id.*; *see* Pet. App. at 6a. Again, no one, voter or non-voter was given the opportunity to speak on the proposed zoning amendment. Pet. App. at 6a.

The Petition does not reference a town meeting the facts of which have previously been proffered as forming part of the basis for petitioners' claims. Respondents

understand that petitioners have waived any contention that their rights were violated at this meeting. Nonetheless, for the sake of completeness and because allegations relative to this meeting are included in petitioners' amended complaint and were considered by the court below, respondents submit the following with regard to the Egremont Special Town Meeting of June 21, 2006. *See* Pet. App. at 6a-7a.

On June 21, 2006, at a Special Town Meeting, the Egremont Town Meeting voted to purchase a new fire truck. J.A. 150 at ¶ 20. The petitioners allege that the respondent, Moderator Gage, called for a vote on the proposed purchase after having asked two people to delay their departure because without them there would have been no quorum. J.A. 151 at ¶ 23. Plaintiff, Thomas F. Curnin, alleges that he was therefore denied the opportunity to speak, although there is no allegation that any decision was made to preclude non-voters from speaking or that voters did speak on the issue. *Id.* In short, there is no allegation that any distinction was made between voters and non-voters.

Again, there is no indication in the record that petitioner, Thomas F. Curnin, ever made his desire to speak known to any respondent herein or any Town Meeting member at this meeting or any other. Nor is there any indication in the record that at any of these meetings voters had or were given the opportunity to speak while non-voters were denied such opportunity.

Petitioner, Miriam Curnin, has not attempted to speak at an annual Town Meeting or Special Town Meeting since the mid-1990s, when she spoke at a Town

Meeting despite the then Moderator's refusal to grant her permission to do so. J.A. 165-167. Miriam Curnin has never communicated a desire to speak to any relevant individual and, in fact, testified "You go to a meeting, and if a subject comes up which you wish to say something, that's when you make the decision." J.A. 171.

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction Over This Matter Because Petitioners Have Not Appealed The Entry Of Judgment In Favor Of Respondents.

The Petition should be denied because this matter has concluded in an un-appealed judgment for the respondents. The denial of petitioners' motion for a preliminary injunction merged with the final judgment dismissing petitioners' case. *See Harper v. Poway Unified School Dist.*, 127 S. Ct. 1484 (2007); *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U.S. 196, 205-206 (1924); *Shaffer v. Carter*, 252 U.S. 37, 44 (1920); *Chaparro-Febus v. Int'l Longshoremen Assoc., Local 1575*, 983 F.2d 325, 331, n.5 (1st Cir. 1993). This Court lacks jurisdiction over this matter because the petitioners have failed to appeal the entry of judgment. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25-26 (1994); *Karcher v. May*, 484 U.S. 72, 83 (1987).

Under certain circumstances, a party aggrieved by an interlocutory order may seek to have the judgment below vacated. *See U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950). However, petitioners have neither sought vacatur nor is it appropriate here. *See U.S. Bancorp*,

513 U.S. at 22-29; *Karcher*, 484 U.S. at 81-83. "This controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party . . . declined to pursue its appeal." *Karcher*, 484 U.S. at 83. Petitioners' failure to pursue an appeal of the entry of judgment for respondents is fatal to their Petition.

II. Petitioners Lack Standing.

There is no indication in the record that petitioners or any other non-voters have been barred from speaking at any meeting at which voters were given the opportunity to speak. Petitioner, Miriam Curnin, concedes that she has not attempted to speak at an Egremont Town Meeting since the 1990's and neither petitioner has made a desire to speak known to any respondent herein at any time. Respondents submit that petitioners have failed to meet their burden of establishing any of the three elements of constitutional standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-562 (1992).

III. This Proceeding Does Not Raise A Novel Question Or One Of "Exceptional" Constitutional Importance.

A. Petitioners Position is in Conflict with Settled Law, which the Court Below Properly Applied.

The court below correctly analyzed the nature of the right asserted, the alleged right to be heard by a legislative body in session. The court of appeals properly treated the Egremont Town Meeting as a legislative body and its analysis is consistent with this Court's

precedent according municipal legislatures and, particularly, legislators full status as such. *See Bogan v. Scott-Harris*, 523 U.S. 44, 48-55 (1998); *Spallone v. United States*, 493 U.S. 265, 279 (1990). *See also Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Gravel v. United States*, 408 U.S. 606 (1972); *Tenney v. Brandhove*, 341 U.S. 367 (1951). Without squarely addressing the issue or providing a reasoned basis for doing so, petitioners wish this Court to depart from settled law by treating municipal legislatures differently from other legislative bodies.

The position that the petitioners advance would have far reaching consequences. Petitioners seek the Court's intervention in the legislative process itself. The relief sought is therefore in conflict with this Court's precedent on this issue.

The relief sought would also implicate federalism and separation of powers concerns by placing this Court in the position of overturning a long line of Massachusetts precedent and, effectively, legislating a fundamental shift in the nature and status of a legislative body.

Further, in advancing their position, petitioners mischaracterize the nature of the speech at issue. Petitioners assert that they have a First Amendment right to address the Egremont Town Meeting because it is the legislative arm of the Town of Egremont while at the same time ignoring the legal impact of its status as a legislative body. *See* Petition at pp. 2, 8-12. *See also* M.G.L. c. 4, § 7, cl. 18B; *In re Opinion of the Justices*, 358 Mass. 838, 840 (1971) (Town Meetings are "the

legislative arm of each Massachusetts town"); *Durand v. IDC Bellingham, LLC*, 440 Mass. 45, 51 (2003) (the legislative acts of town meetings "carr[y] a strong presumption of validity"); *Southern New England Conference Assoc. of 7th Day Adventists v. Town of Burlington*, 21 Mass. App. Ct. 701, 708 (1986) ("the vote rejecting the article constitutes the deliberative act of the legislative body. The Court will not set such a vote aside, even if it could be shown . . . that the vote may have been influenced by mistaken beliefs").

Petitioners seek to simply subsume the speech at issue under the general rubric of "political speech." They ignore, however, the status of the Egremont Town Meeting as a legislative body. Petitioners' claim of right fails because a deliberating legislative body is entitled to control its own order of debate. *See Gravel*, 408 U.S. at 625.

B. The Doctrine of Absolute Legislative Immunity Bars the Imposition of the Relief Sought.

It is indisputable that, "[a]bsolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Bogan*, 523 U.S. at 55, *quoting*, *Tenney*, 341 U.S. at 376. Debate and a legislature's ability to govern debate are unquestionably "integral steps in the legislative process." *Id.* at 55 (citations omitted). *See also Gravel*, 408 U.S. at 616, 625. Legislative immunity applies to the actions of local legislators. *Id.* at 48-54.

The actions of the Moderator in the instant action in setting the order of debate (subject to the will of the

body as a whole) are also protected by absolute legislative immunity. "Whether an act is legislative turns on the nature of the act, rather on the motive or intent of the official performing it." *Id.* at 54. "Officials outside of the legislative branch are entitled to legislative immunity when they perform legislative functions." *Id.* at 55.

Finally, absolute legislative immunity extends to actions seeking injunctive relief and therefore, the Egremont Town Meeting can not be enjoined as requested. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975).

IV. Petitioners Mischaracterize The Decision Below, Seek To Create A Conflict Amongst The Circuits Where None Exists, And Misstate, As A Matter Of Law, The Nature And Extent Of A Moderator's Discretion.

Contrary to petitioners' assertion, the court of appeals did not require evidence of viewpoint discrimination as a precondition to an analysis of petitioners' "unbridled discretion argument." *See* Petition at p. 12. First, the court of appeals rejected petitioners' argument that the Egremont Town Meeting engages in viewpoint discrimination by according different rights to voters (legislators) and non-voters (members of the general public). Pet. App. at 15a. The court of appeals held that the distinction is "entirely content-neutral" and is rational given the time constraints under which the body operates. *Id.*

Next, the court of appeals rejected petitioners' argument that the Moderator enjoys an impermissible level of discretion and, particularly, petitioners' reliance on decisions arising out of the licensing context. *Id.* at 15a-16a. As the court of appeals properly recognized, "These cases are different in kind. They do not involve speech before deliberating legislative bodies." *Id.* at 16a. Petitioners' attempt to manufacture a conflict amongst the circuit courts also fails for this reason.

The court of appeals further recognized that "some measure of discretion is inherent in the role of a moderator." *Id.* Finally, the court of appeals noted that there is no evidence in the instant matter that the Moderator, Egremont Town Meeting, or any other individual or body acting on behalf of the Town of Egremont has, in fact, engaged in viewpoint discrimination. *Id.* By noting that there is a lack of such evidence, the court of appeals did not, contrary to petitioners' argument, purport to require such evidence.

Further, in formulating their argument, petitioners have misstated, as a matter of law, the nature and extent of a moderator's discretion. Though empowered to decide questions of order in the first instance, a moderator acts at all times at the pleasure of the legislative body, which has the ultimate authority to determine how legislative sessions are conducted. *See* M.G.L. c. 39, §§ 15, 17; *MacKeen v. Town of Canton*, 379 Mass. 514, 516 (1980) ("[T]he town meeting, and not the moderator, has the ultimate power to decide how to proceed"). To the extent that the legislative body disapproves of any ruling of the moderator on a question

of order, it has the authority to overrule the moderator while in session and, ultimately, to vote the moderator out of office. *See MacKeen*, 379 Mass. at 516-517. The fact that the petitioners choose not to register to vote in Egremont and, therefore, deny themselves a voice in the procedures adopted by the Egremont Town Meeting and its Moderator does not create a constitutional violation. *See Minnesota State Board for Comm. Colleges v. Knight*, 465 U.S. 271, 289-290 (1984).

V. The Court Of Appeals Decision Is Consonant With This Court's Precedent And Decisions Of Other Courts Of Appeals - Forum Analysis Is Inapplicable Here.

As the court of appeals recognized, "The Supreme Court has never extended First Amendment forum analysis to a deliberating legislative body or to the body's rules about who may speak." Pet. App. at 11a. The court of appeals correctly rejected the application of forum analysis here. *See* Pet. App. at 10a-12a.

Contrary to petitioners' characterization, this is not a claim of access to either a public forum or a non-public forum. Rather, the right asserted, a government audience for petitioners' views, has been expressly rejected by this Court. *See Knight*, 465 U.S. at 280-282.

> Appellees here make a claim quite different from those made in the non-public forum cases. They do not contend that certain government property has been closed to them for use in communicating with private individuals or public officials not acting as

> such who might be willing to listen to them. Rather, they claim an entitlement to a government audience for their views.

Id. at 282.

Petitioners here assume entitlement to an audience for their views based on their status as property owners. However, the petitioners "have no constitutional right to force the government to listen to their views," either as members of the public or as property owners. *Id.* at 283. "The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id.* at 283.

> Legislatures throughout the nation, including Congress, frequently enact bills on which no hearings have been held or on which testimony has been received from only a select group. Executive agencies likewise make policy decisions of widespread application without permitting unrestricted public testimony. Public officials at all levels of government daily make policy decisions based only on the advice they decide they need and choose to hear. To recognize a constitutional right to participate directly in government policy making would work a revolution in existing government practices.

Id. at 284.

The registered voters of the Town of Egremont sitting as the Town Meeting constitute a legislative body in session and petitioners have no greater right to address that body than they do to be heard by the United States Congress when in session.

The decision of the Supreme Court of the United States in *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n.*, 429 U.S. 167 (1976), relied on by the petitioners, is inapposite. The Court's opinion in *City of Madison* turned on the fact that the teachers therein were barred from speaking "during a portion of the meeting devoted to expression of opinion by the public. . . ." *Id.* at 171. *See also id.* at 174-175. That decision is inapplicable to the conduct of a legislative session.

In *Knight*, this Court distinguished the rights at issue in *City of Madison* in a manner which is directly applicable to the instant action:

> The rights at issue in these cases are accordingly wholly unlike those at stake in *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n.*, 429 U.S. 167, 97 S. Ct. 421, 50 L.Ed.2d 376 (1976). The Court in that case upheld a claim of access to a public forum, applying standard public forum First Amendment analysis. *See Perry Education Assn. v. Perry Educators' Assn.*, *supra*, at 45, (citing *Madison Joint School District* as an example of a case involving a "forum generally open to the public" for expressive activity).

> The school board meetings at issue there were "opened [as] a forum for direct citizen involvement," 429 U.S. at 175, and "public participation [was] permitted," *id.* at 169. The First Amendment was violated when the meetings were suddenly closed to one segment of the public even though they otherwise remained open for participation by the public at large. These cases, by contrast, involve no selective closure of a generally open forum, and hence any reliance on the *Madison* case would be misplaced.

Knight, 465 U.S. at 281 (footnote omitted). Similarly, the instant action does not involve the selective closure of a generally open forum and therefore, the petitioners' reliance on *City of Madison* is misplaced. In fact, the genesis of the petitioners' complaint is the very fact that the Egremont Town Meeting has not opened its sessions to discussion and debate by members of the general public. As set forth above, the Town Meetings at issue have not been opened to the public for discussion and, therefore, no forum has been opened. Contrast, *City of Madison*, 429 U.S. at 174-176.

The petitioners argue that the decision below conflicts with decisions of the United States Courts of Appeals for the Ninth and Tenth Circuits which have applied public forum analysis in other contexts. *See Kindt v. Santa Monica Rent Control Board*, 67 F.3d 266 (9th Cir. 1995); *Mesa v. White*, 197 F.3d 1041, 1043 (10th Cir. 1999). Neither of these case deals with a legislative body and both can be distinguished in that they involved meetings which were opened to the

general public for discussion. *See Kindt*, 67 F.3d at 271-273; *Mesa*, 197 F.3d at 1043 ("Mesa . . . asked to speak during the public comment period of the next commission meeting"). *See also* Pet. App. at 12a.

In *Kindt*, the Ninth Circuit upheld regulations of the defendant Board which limited public commentary to the end of meetings and which set a time limit on comments from the public. *Kindt*, 67 F.3d at 271-273. Nothing in the Ninth Circuit's opinion in *Kindt* intimates that a public body's deliberations are always subject to a public forum analysis or provides support for the application of such an analysis here. *See id.* at 272.

Mesa stands for the proposition that a municipal body usually can not pick and choose which members of the public will be allowed to speak at hearings where public comment is allowed. *Mesa*, 197 F.3d at 1044-1047. The *Mesa* court did not hold that a public body's deliberations are always subject to public forum analysis. Rather, a public forum was created when the body at issue intentionally opened a meeting to public comment. *Id.* at 1045.

Here, in addition to the fact that there is no allegation that any non-voter was allowed to speak at any of the meetings at issue, there is no indication that any voter had the opportunity to speak. As such, these cases are inapposite.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant their Petition. Therefore, respondents respectfully request that the Petition be denied.

Respectfully submitted,

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No. 07-1279

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MIRIAM CURNIN and THOMAS F. CURNIN,

Petitioners,

—v.—

TOWN OF EGREMONT, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondents mischaracterize the nature of Petitioners' First Amendment claims, attempt to raise fact issues where none exist, rely on irrelevant bodies of law and predict a supposed parade of horribles that will befall the Egremont Town Meeting—indeed, democratic institutions nationwide—if this Court were to grant certiorari and rule in Petitioners' favor. Respondents' arguments on the merits of Petitioners' claims are demonstrably overblown and incorrect. What they demonstrate most of all is Respondents' inability squarely to confront the serious conflict between the court of appeals' ruling below and decisions of this Court and other courts of appeals. The petition should be granted.

ARGUMENT

1. This Court Has Jurisdiction

Respondents incorrectly claim that because the "denial of petitioners' motion for a preliminary injunction merged with the final judgment dismissing petitioners' case," this Court "lacks jurisdiction over the matter because the petitioners have failed to appeal the entry of judgment." Brief in Opposition ("Opp. Br.") at 5. What Respondents are saying is that to seek review by this Court, Petitioners were required to appeal again to the First Circuit from the final judgment (entered as a direct and inevitable consequence of the First Circuit's ruling as to which review is sought), seek another ruling from the court of appeals on the precise issue that the court had already decided and then seek review by this

Court. Respondents are mistaken. This Court clearly has jurisdiction to review the First Circuit's decision pursuant to 28 U.S.C. § 1254(1) and none of the authorities cited by Respondents suggest otherwise.

U.S. Bancorp Mortgage Co. v. *Bonner Mall Partnership*, 513 U.S. 18, 19 (1994), addressed the question of whether federal appellate courts "should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari sought." *Karcher* v. *May*, 484 U.S. 72, 74 (1987), addressed the question of "whether public officials who have participated in a lawsuit solely in their official capacities may appeal an adverse judgment after they have left office." Neither case holds or implies that the only proper procedure available here was for Petitioners to await entry of the final judgment by the district court and return to the court of appeals yet again before seeking this Court's review.

Respondents' forced jurisdictional argument also makes no sense as a matter of judicial economy as it would require multiple and futile appeals to the appellate court that has already ruled on the legal issues at stake here. The court of appeals issued its definitive ruling affirming the denial of the preliminary injunction on November 29, 2007. App. 1a.[1] On December 10, 2007, the district court granted Respondents' motion for summary judgment, basing its decision entirely on the First Circuit's opinion. App. 23a-24a ("Although the First Circuit's review was

[1] References to "App." are to the appendix to the petition for a writ of certiorari.

titularly limited to the district court's ruling on the Motion for Preliminary Injunction, the language of [Circuit] Judge Lynch's opinion made the court's rejection of Plaintiffs' theory of recovery very clear . . . .The import of the First Circuit's opinion affirming denial of the Motion for Preliminary Injunction is that Plaintiffs' claims have no constitutional force, and that Defendants' Motion for Summary Judgment must be allowed."). On January 9, 2008, the First Circuit denied Petitioners' motion for a rehearing. App. 19a-20a. Requiring Petitioners to have then appealed the December 10, 2007 entry of judgment would have meant a third request to the First Circuit to address the same questions of law between the same parties. This path is not required by this Court's decisions nor controlling statutory authority. *See United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); 28 U.S.C. § 1254(1). This Court has jurisdiction.

2. The Petition Presents Pure Questions of Law

Respondents claim that "the Petition omits various facts which are significant to the resolution of this action," Opp. Br. at 2, and then attempt to manufacture disputes over immaterial facts. Even passing the fact that Respondents' brief in opposition is no place to be debating the underlying merits of this case, there are no relevant factual disputes here—only a fundamental dispute regarding the law. Respondents claim that they can treat Egremont residents who are not locally-registered voters differently than town residents who are voters when it comes to speech rights at town meetings despite the fact that

non-voting residents live in the town, pay taxes to the town, and receive essential services from the town. In any event, there is no dispute that at the start of the May 26, 2005 special town meeting non-voters were denied the same opportunity to speak at the meeting as that given to voters. App. 6a; J.A. 41, 108.[2] There is also no dispute that at the May 2, 2006 annual town meeting non-voters who wished to speak were told to wait until the voters had had a chance to speak.[3] App. 6a; J.A. 56. Respondents' strained effort to inject fact issues at this stage of the case is flatly contradicted by the record.

3. Petitioners Have Standing

Without discussing any of the requirements for standing, Respondents blithely insist that Petitioners have failed to establish any of the three elements of standing set forth in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992). Respondents' argument is patently frivolous. The first element of the standing inquiry requires petitioners to have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent." *Id.* at 560. Here, Respondents have denied and continue to deny Petitioners the same

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[2] References to "J.A." are to the appendix of record materials filed with the court of appeals.

[3] Respondents also erroneously claim that "neither petitioner has made a desire to speak known to any respondent herein at any time." Opp. Br. at 6. The record is uncontradicted that Petitioner Thomas F. Curnin and another non-voter rose to speak at the May 2, 2006 annual town meeting and were told by Respondent Thomas Gage, the Town Moderator, to "wait" and that they "would be considered later." App. 6a. *See also* J.A. 56.

opportunity to speak at Egremont Town Meetings as that afforded other town residents. The second element of the standing inquiry requires that the injury be "fairly traceable" to the challenged action. *Id.* Here, Petitioners' First Amendment injury is a direct result of Respondents' policy to deny non-voting residents the same opportunity to speak at town meetings as that enjoyed by other town residents. The third and final element of the standing inquiry requires that it "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks and citation omitted). Here, a decision in favor of Petitioners would give them the very relief they have been seeking all along—the same opportunity to speak at town meetings as that given to voters.

Respondents' standing argument further fails because Petitioners present both an "as-applied" and a facial challenge to the Town of Egremont's discriminatory speech policy. This Court has long recognized a party's standing to bring a facial challenge to a policy or practice such as Egremont's that places unfettered discretion in the hands of a government official to decide who can and cannot speak. *Forsyth County, Georgia* v. *The Nationalist Movement*, 505 U.S. 123, 129-30 (1992); *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 766 (1988).

4. By Requiring Evidence of Viewpoint Discrimination the First Circuit's Decision Below Clearly Conflicts With Decisions of this Court and Other Courts of Appeals

Respondents are incorrect in claiming that "the court of appeals did not require evidence of viewpoint discrimination as a precondition to an analysis of petitioners' 'unbridled discretion argument.' " Opp. Br. at 9. Addressing petitioners' unbridled discretion argument, the First Circuit specifically stated that

> [t]o the extent the Curnins suggest that the moderator's discretion could enable him to engage in viewpoint discrimination, there is no evidence of any such behavior here. *No evidence has been presented* to suggest that Egremont is attempting to "give one side of a debatable public question an advantage in expressing its views," *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785, 98 S.Ct. 1407, 55 L.E.2d 707 (1978). App. 16a (emphasis added).

The opinion could not be clearer in articulating that Petitioners' claim was defeated for the failure to meet an evidentiary burden that is simply not required under controlling constitutional principles. Stated another way, had petitioners "presented" such evidence, the First Circuit indicated that it would have entertained Petitioners' unbridled discretion claim. The First Circuit thus ignored a long line of authority from this Court and other federal appellate courts holding that it is the *mere threat* of viewpoint discrimination that condemns placing unbridled discretion in

the hands of local officials, not actual evidence of viewpoint discrimination, which is often difficult if not impossible to show in these circumstances. *See* Petition at 13-15.

Respondents also attempt to blunt the unbridled discretion problem by arguing that the Town Moderator "acts at all times at the pleasure of the legislative body, which has the ultimate authority to determine how legislative sessions are conducted." Opp. Br. at 10. While this may be an accurate statement of town meeting procedure, it is flawed on many levels. First, as a practical matter, and as demonstrated in the record, the Town Moderator calls the shots at town meetings with respect to various matters of order, including determining who gets to speak and when. It is clear that the Town Moderator has made decisions regarding who can and cannot speak on important issues of public concern for reasons only he knows. *See* J.A. 34. For example, when asked during his deposition what the protocol is when a non-voter wishes to speak at a town meeting, Respondent Thomas Gage responded "[i]t depends on the issue I guess. . . . Sometimes I go to the town and ask them if they will allow [non-voters] to speak. . . . Depending on the issue." Second, the practice of putting the issue of speech rights to a vote of the town meeting, as was done at the May 26, 2005 special town meeting, J.A. 41, 108, only trades one constitutional defect for another. It is well settled that fundamental rights, such as the right to freedom of speech, cannot be left to the vicissitudes of a majority vote. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624,

638 (1943) ("One's right to life, liberty, and property, to free speech, . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

5. The First Circuit's Decision on the Application of the Public Forum Doctrine Conflicts With Decisions By this Court and Other Courts of Appeals

As discussed in the petition, in holding that public forum analysis is inapposite to the Egremont Town Meeting, the decision below conflicts with this Court's decision in *City of Madison, Joint School District No. 8* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), and authoritative rulings of the Ninth and Tenth Circuit Courts of Appeals. Petition at 16-20. Attempting to argue otherwise, Opp. Br. at 11-15, Respondents ignore the fact that the Egremont Town Meeting is a form of direct democracy and not a representative body.

The Egremont Town Meeting is an open town meeting—*i.e.*, a direct democracy—that exists only when it is in session and whose composition cannot be determined until the meeting is called to order. This important distinction explains why Respondents' argument based upon representative bodies such as the United States Congress is flawed. Opp. Br. at 13. When a legislature is representative in nature, citizens need not be given the opportunity to address it directly. They may instead lobby their elected representatives, and may do so whether or not they are registered voters or even voted for that particular representative.

This Court has recognized the distinction between direct and representative forms of democracy. For example, while *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984), stands for the proposition that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy," the Court made clear that it was referring to our country's republican—or representative—form of government. 465 U.S. at 283. The Court even cited Justice Holmes in noting that " '[t]he Constitution does not require all public acts to be done in *town meeting* or an assembly of the whole.' " *Id.* at 284 (*quoting Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441, 445 (1915)) (emphasis added). Of course, the Egremont Town Meeting is a town meeting and not a representative body to which the Court's comments in *Knight* were directed.

That the Egremont Town Meeting does not set time aside at each meeting for public comment does not distinguish it from the public meetings at issue in *City of Madison*; *Kindt* v. *Santa Monica Rent Control Board*, 67 F.3d 266 (9th Cir. 1995); and *Mesa* v. *White*, 197 F.3d 1041 (10th Cir. 1999). There is simply no reason to set a time for public comment in a direct democratic body as there is in a representative one. If a person wishes to speak at the Egremont Town Meeting he or she simply stands up and waits to be acknowledged by the Town Moderator. J.A. 262.

Respondents argue that *Mesa* and *Kindt* are further distinguishable because they did not involve legislative bodies in session. Respondents

are splitting hairs. While it is true that these cases did not address a town meeting such as the Egremont Town Meeting, they did address local governmental bodies that set policy. *See Kindt*, 67 F.3d at 267 (an elected rent control board); *Mesa*, 197 F.3d at 1043 (a county commission). Moreover, it is unlikely that any other federal court of appeals will address the issue of speech restrictions at open town meetings as the town meeting form of government is employed primarily in New England. This Court's certiorari jurisdiction is not so stingy. There is a split in authority between the First Circuit on the one hand, and the Ninth and Tenth Circuits on the other hand, on the important issue of whether speech restrictions at the municipal government level should be subject to public forum analysis. This doctrinal split involving the proper First Amendment scrutiny to be applied to these speech restrictions warrants this Court's review.

6. The Petition Raises No Federalism or Separation of Powers Concerns

Respondents distort and overstate petitioners' claims in urging that "petitioners wish this Court to depart from settled law by treating municipal legislatures differently from other legislative bodies" and "seek the Court's intervention in the legislative process itself." Opp. Br. at 7. Indeed, Respondents go so far as to brazenly attempt to convince this Court that Petitioners are asking it to do no less than to "overturn[ ] a long line of Massachusetts precedent and, effectively, legislat[e] a fundamental shift in the nature and status of a legislative body." *Id.* Petitioners request no such thing. Petitioners fully recognize the

legal status of the Egremont Town Meeting as a municipal legislature. The relief they seek does not require this Court to interfere in the legislative process by setting aside votes or other actions taken by the town meeting as Respondents' brief implies. *Id.* at 7-8. And Petitioners do not "assert that they have a First Amendment right to address the Egremont Town Meeting because it is the legislative arm of the Town of Egremont . . . ." *Id.* at 7. Petitioners merely request that non-voting resident taxpayers be given the *same opportunity* to speak at Egremont Town Meetings as that given to resident voters. Declaring that a non-discriminatory speech policy is required by the First Amendment will hardly embroil the federal courts in the decisions of a local legislative body.

7. The Doctrine of Legislative Immunity Does Not Bar Petitioners' Claims

Respondents also urge that the doctrine of legislative immunity is fatal to Petitioners' claims. That is not the case. The Town of Egremont is not a legislature and it is fully within the authority of the federal courts to enjoin the town and its officers from enforcing its unconstitutional policy of exclusion. *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 690 (1978) (Municipalities and local governing bodies "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."). As for the individual Respondents, their actions in

denying Petitioners the same opportunity to speak at town meetings as that given to other town residents cannot accurately be characterized as "legislative acts" entitled to protection under the doctrine of legislative immunity. *See, e.g., Negron-Gaztambide* v. *Hernandez-Torres*, 35 F.3d 25, 28 (1st Cir. 1994), *cert. denied*, 513 U.S. 1149 (1995).[4]

[4] Neither the district court nor the court of appeals ruled on this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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